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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1940

No. 743

JAMES F. McKAY et al.,
Petitioners,

vs.

RETAIL AUTOMOBILE SALESMEN'S LOCAL UNION No. 1067, et al., and HOWARD AUTOMOBILE COMPANY (a corporation),
Respondents.

BRIEF FOR RESPONDENT, RETAIL AUTOMOBILE SALESMEN'S LOCAL UNION NO. 1067, IN OPPOSITION

To Petition for a Writ of Certiorari to the Supreme Court of the State of California.

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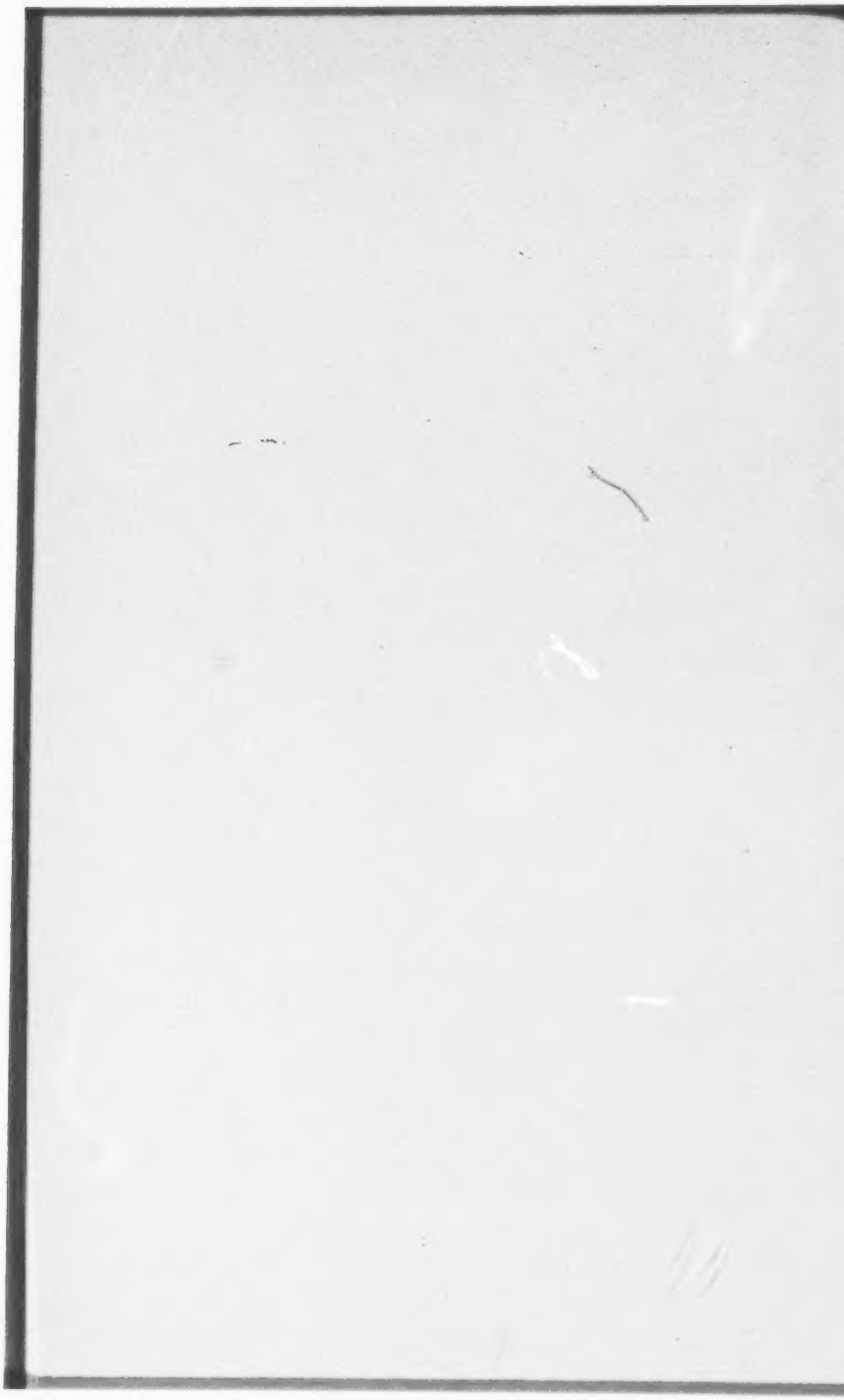

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I.

OPINION OF THE COURT BELOW.

The opinion of the Superior Court is unreported but appears in the record. (R. 14-22.)

The opinions of the District Court of Appeal of the State of California are reported in 89 Pac. (2d) 426, 90 Pac. (2d) 113 (not yet officially reported) and also appear in the record. (R. 102-122.)

The opinion of the Supreme Court of the State of California is reported in 100 Cal. Dec. 347, 106 Pac. (2d) 373 and is also printed in the record. (R. 25-79.)

The opinions of the Supreme Court in the companion cases of *Shafer v. Registered Pharmacists Union Local 1172* and *Smith Metropolitan Market Co., Ltd. v. Lyons et al.*, are reported in 100 Cal. Dec. 391 and 397 and in 106 Pac. 403 and 414, and are also printed in the record. (R. 79-87 and R. 88-100.)

II.

JURISDICTION.

The date of the judgment of the Supreme Court of the State of California sought to be reviewed was October 14, 1940. (R. 101.) A rehearing was denied by the California Supreme Court on November 9, 1940. (R. 101.)

Petition for writ of certiorari was filed on February 3, 1941, and served on respondent Retail Automobile Salesmen's Local Union No. 1067, on February 4, 1941.

Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925, fails to confer jurisdiction because (1) no final judgment has been ren-

dered; (2) the claimed federal right was neither properly presented nor adjudicated; (3) no substantial federal question has been presented; (4) the judgment of the state Court rests upon non-federal grounds adequate to support it.

III.

CORRECTED STATEMENT OF THE CASE.

Pursuant to the provisions of Subdivision 3 of Rule 27, respondent Retail Automobile Salesmen's Union presents the following corrected statement of the case.

Petitioners (hereinafter designated as "plaintiffs") are all the salesmen employed by the Howard Automobile Company, a California corporation, alleged to be "engaged in the business of selling and repairing automobiles in San Francisco and elsewhere". (R. 2.) Employees of the Company, other than salesmen, are members of Auto Painters, Auto Mechanics, Parts Clerks, Garage Employees and Teamsters Unions. (R. 5.) These organizations and the Retail Automobile Salesmen's Local (hereinafter called the Salesmen's Union) are affiliated with the San Francisco Labor Council. (R. 6.)

Upon the refusal of plaintiffs to join the Salesmen's Union all of the employees except the salesmen withdrew their labor and struck the Company. (R. 5-6.) The Salesmen's Union placed a peaceful picket line around the plant. (R. 5-6.) The Labor Council

put the firm on the "We don't patronize" list. (R. 6.) Thereupon plaintiffs commenced an action in the Superior Court of the State of California, against the employer, the Salesmen's Union, the other named unions and the Labor Council, seeking to enjoin the picketing, boycotting and striking of these organizations. (R. 1-7.)

The complaint contained no allegation claiming a title, right, privilege or immunity under the Constitution or any treaty or statute of the United States except the assertion that plaintiffs "united and organized and designated three of their number a committee to negotiate rates of pay, wages, hours of labor and other conditions of employment with the said company in accordance with the terms of the Wagner Labor Relations Act and the said committee forthwith notified said company and defendant Alice M. Rossiter, Regional Director of the National Labor Relations Board, of plaintiffs' said choice of a bargaining representative." (R. 4.)

On the basis of the complaint and ex parte, the Superior Court ordered defendants to show cause why they should not be enjoined as prayed and issued a temporary restraining order, enjoining defendants pending the hearing of the order to show cause. (R. 8-10.)

In return to the order to show cause the Salesmen's Union filed a demurrer and a motion to strike portions of the complaint. (R. 10-14.) The demurrer challenged the complaint both generally on the ground that it failed to state a cause of action and specially

on the ground, among others, that "said complaint is uncertain in that it cannot be ascertained therefrom: (1) whether plaintiffs and/or defendant Howard Automobile Company are engaged in interstate commerce or intrastate commerce or both interstate and intrastate commerce." (R. 11.)

Prior to the hearing of the order to show cause, plaintiffs dismissed the action against defendant Rossiter. (R. 8.)

At the hearing plaintiffs submitted their application for a temporary injunction on the allegations of their complaint. (R. 15.)

The Superior Court ordered that defendants' demurrer be sustained *with leave to plaintiffs to amend within ten days;* that the temporary restraining order be dissolved and that plaintiffs' application for a temporary injunction be denied. (R. 14.)

The Superior Court upheld defendants' right of peaceful picketing in an opinion rendered with its order. (R. 14-22.) To plaintiffs' contention that an injunction should issue because the picketing violated asserted rights under the National Labor Relations Act the Court answered that it was "nowhere alleged in the complaint that defendant Howard Automobile Company is engaged in interstate commerce so as to bring it under the jurisdiction of that statute." (R. 21.)

Plaintiffs did not amend. They did not even attempt to allege the facts which would have properly raised the issue of their asserted rights under the National Labor Relations Act.

Instead, plaintiffs *appealed from the orders dissolving the temporary restraining order and denying their application for a temporary injunction.* (R. 23.)

The intermediate Appellate Court, the District Court of Appeal, held that the complaint stated a cause of action and that the demurrer should have been overruled. (R. 102-116.)

The California Supreme Court affirmed the orders of the Superior Court (R. 101-102) holding (1) that the complaint charged merely peaceful picketing; (2) that peaceful picketing for a closed union shop was lawful in California under the California Labor Code and (3) that plaintiffs' asserted rights under the National Labor Relations Act did not merit consideration since the allegations of the complaint failed to raise this issue under settled rules of state pleading.

In reply to plaintiffs' contention that because plaintiffs had established their own labor organization any attempt to interfere with their labor relations was unlawful, the Court held that such contention could not be sustained for two equally conclusive reasons: (1) under California law one labor union is not entitled to the protection of equity against lawful competitive activities of a rival union, and (2) plaintiffs' complaint failed sufficiently to show that plaintiffs had organized a bona fide independent labor union. (R. 38-41.) With respect to the latter ground the Court emphasized the need for specific allegations concerning the nature of a claimed labor organization when, as in the present case, plaintiffs

offered the complaint as the only evidence to justify the issuance of temporary injunctive relief in a labor controversy. The Court based this ruling upon the ground that the granting of a temporary injunction in a labor dispute usually terminated the entire matter.

While the Supreme Court affirmed the orders of the trial Court it did not dismiss plaintiffs' complaint.

IV.

SUMMARY OF ARGUMENT.

A. The petition for a writ of certiorari should be denied for want of a final judgment.

B. The petition for a writ of certiorari should be denied because the sole federal right which petitioners sought to assert, to-wit, an alleged right under the National Labor Relations Act, was neither properly presented nor adjudicated.

1. The asserted federal right was not properly presented.

2. The asserted federal right was not adjudicated.

C. The petition for a writ of certiorari should be denied for want of a substantial federal question.

D. The petition for a writ of certiorari should be denied because the judgment of the state Court is based upon non-federal grounds adequate to support it.

E. An analysis of plaintiffs' "Questions Presented" (Petition, p. 9) conclusively demonstrates that the writ of certiorari should be denied.

V.

ARGUMENT.

A. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED FOR WANT OF A FINAL JUDGMENT.

It is axiomatic that a state Supreme Court's denial of temporary relief does not constitute a final judgment in the cause, and therefore certiorari will be denied. In the instant case plaintiffs appealed from orders denying a *temporary* injunction and dissolving a *temporary* restraining order.

In *William v. Quill,* 303 U. S. 621, 58 S. Ct. 650, 82 L. Ed. 1085, this Court dismissed for want of a final judgment an appeal from a state Court's denial of a temporary injunction against concluding a closed shop contract.

This Court, in *American Federation of Labor v. Swing,* 309 U. S. 659, 60 S. Ct. 514, 84 L. Ed. 1007, denied for want of a final judgment its writ of certiorari to review a judgment of a state Court granting a preliminary injunction against picketing in a labor controversy.

In *Gant v. Oklahoma City,* this Court dismissed for want of a final judgment an appeal from an order denying a temporary injunction (284 U. S. 594, 52 S. Ct. 203, 76 L. Ed. 512) and thereafter entertained

an appeal from a subsequent order denying a permanent injunction. (293 U. S. 98, 53 S. Ct. 30, 77 L. Ed. 1058.)

Twin City Power Co. v. Savannah River Elect. Co., 284 U. S. 74, 52 S. Ct. 17, 76 L. Ed. 499, holds that for want of a final judgment an appeal will be dismissed and certiorari denied from a judgment of a state Court refusing a temporary injunction.

To the same effect:

Brannan v. Harrison, 284 U. S. 579, 52 S. Ct. 28, 76 L. Ed. 502;

Reddell v. Bryan, 24 How. 420, 16 L. Ed. 740;

Moses v. Mobile, 15 Wall. 387, 21 L. Ed. 176.

It is immaterial that the state Court's opinion with respect to temporary injunctive relief governs its subsequent action as to permanent relief.

American Federation of Labor v. Swing, 61 S. Ct. 568;

Gant v. Oklahoma City, 293 U. S. 98, 53 S. Ct. 30, 77 L. Ed. 1058.

The form of the judgment rendered by the trial Court has been held to control the question of the finality of such judgment.

Louisiana Nav. Co. v. Oyster Commission, 226 U. S. 99, 33 S. Ct. 78, 57 L. Ed. 138.

This Court in *Missouri and Kansas Int. Ry. Co. v. Olathe,* 222 U. S. 185, 32 S. Ct. 46, 56 L. Ed. 155, dismissed for want of a final judgment a writ of error to review a judgment of the state Court which had

sustained a general demurrer to a complaint but had not dismissed the action.

North Carolina R. Co. v. Story, 268 U. S. 288, 45 S. Ct. 531, 69 L. Ed. 959 (cited in petitioners' petition, p. 5), is not in point for the reason that the question there involved was the refusal of the Court to grant a *permanent* injunction.

B. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE SOLE FEDERAL RIGHT WHICH PETITIONERS SOUGHT TO ASSERT, TO-WIT, AN ALLEGED RIGHT UNDER THE NATIONAL LABOR RELATIONS ACT, WAS NEITHER PROPERLY PRESENTED NOR ADJUDICATED.

1. The asserted federal right was not properly presented.

The sole reference to a federal right in plaintiffs' complaint is their allegation that "plaintiffs united and organized and designated three of their number a committee to negotiate rates of pay, and other conditions of employment with the said Company in accordance with the terms of the Wagner Labor Relations Act and the said committee forthwith notified said Company and defendant Alice M. Rossiter, Regional Director of the National Labor Relations Board of plaintiffs' said choice of a bargaining representative." (R. 4.)

The trial Court sustained defendants' demurrer to this allegation on the ground that the complaint did not state facts showing the applicability of the Act and gave plaintiffs ten days within which to amend

their complaint. The California Supreme Court likewise held that the pleading was insufficient to present plaintiffs' asserted rights under the National Labor Relations Act.

This decision followed long established rulings of California law.

A complaint should, of course, state facts and not conclusions of law.

Callahan v. Broderick, 124 Cal. 80, 56 Pac. 782;
C.C.P., Section 426.

An allegation that one has acted in accordance with a statute is a conclusion of law.

Postal Telegraph & Cable Co. v. Los Angeles, 164 Cal. 156, 128 Pac. 19;
Noble v. Provident Irrigation District, 10 Cal. App. (2d) 284, 51 Pac. (2d) 896;
Luckehe v. Reclamation Dist. No. 2054, 73 Cal. App. 361, 238 Pac. 760.

"When a pleader wishes to avail himself of a statutory privilege or right, given by particular facts, he must show the facts." (p. 167.)
Dye v. Dye, 11 Cal. 163.

The decision of the state Court as to the pleading of an asserted federal right binds this Court if it is not rendered in a spirit of evasion to defeat such asserted claim.

Vandalia R.R. Co. v. Indiana, 207 U. S. 359, 28 S. Ct. 130, 52 L. Ed. 246;
Atlantic Coast Line R. Co. v. Mims, 242 U. S. 532, 37 S. Ct. 188, 61 L. Ed. 476;

Nevada-California-Oregon Ry. v. Burris, 244 U. S. 103, 37 S. Ct. 576, 61 L. Ed. 1019.

Plaintiffs cannot successfully contend that the decision here was rendered in a spirit of evasion to defeat the claim of federal right when the Court actually granted them the opportunity to amend.

Nor do plaintiffs improve their position by arguing that the ruling of the California Supreme Court was "shockingly novel"; was not "suggested by either lower court * * *", "came unexpectedly at the end of the proceeding when petitioners had no right to add to the record and supplied a new and unexpected basis for petitioners' claim of denial of federal right." (Petition, pp. 8-9.)

The Superior Court expressly advised plaintiffs that the asserted federal right was not well pleaded. The Court granted plaintiffs "a right to add to the record" to state that contention. That the pleading remained insufficient when plaintiffs presented it to the Supreme Court of California was due to their neglect. In this connection the case of *Brinkerhof Trust Co. v. Hill,* 281 U. S. 673, cited by plaintiffs (Petition, p. 43) does not aid them. There no Court referred to the remedy until the state Supreme Court overruled its previous decision after the expiration of the time during which such remedy was available.

Likewise plaintiffs' contention that the state Supreme Court should have taken judicial notice that the Company was engaged in interstate commerce is unavailing in this Court for a number of reasons.

In the first place judicial notice is a matter which lies exclusively within the judgment of the state Court.

Wear v. Kansas ex rel. Brewster, 254 U. S. 154, 38 S. Ct. 55, 62 L. Ed. 214.

In the second place at no time during the proceedings did plaintiffs even urge any state Court to take judicial notice of the claimed fact that the automobile business was interstate business and that this particular company's business was interstate. Plaintiffs' sole contention in the state Courts was that their pleading sufficiently alleged that the Company was engaged in interstate business. Now that both the trial and state Supreme Courts have ruled that the allegation was demurrable plaintiffs are neither in the correct forum nor at the appropriate stage of the proceedings to urge this argument as to judicial notice.

In fact, even had plaintiffs made the point, it would not have been well taken under California law.

Mound W. Co. v. Southern California Edison Co., 184 Cal. 602, 194 Pac. 1014.

In the third place, a mere statement of plaintiffs' argument on this point demonstrates its unsoundness (Petition pp. 41-43.) Plaintiffs' argument runs (1) the California Court is required to know and analyze every bulletin issued by the Departments of the United States Government; (2) a careful analysis of two particular bulletins might indicate that there were no automobile factories in California; (3) the automobile business must therefore be an interstate business; (4) hence the plaintiffs' employer which is

engaged in automobile selling and repairing business in San Francisco and elsewhere is in interstate commerce. The non-sequitur of this argument is at once apparent.

Finally the additional argument that the Company's business "affects" interstate commerce and hence falls under the Act does not improve plaintiffs' position because even that presently suggested fact was not pleaded.

2. The asserted federal right was not adjudicated.

The state Court has not rendered any decision on the asserted federal right and no decision thereupon was necessarily involved. The state Court only decided that in the face of a special and general demurrer the complaint did not state facts sufficient to plead a federal right.

Plaintiffs do not show that they could not even now obtain leave of the state Courts to amend their complaint in order to plead the federal question. Furthermore, even assuming that the time has expired to amend plaintiffs' complaint in the present action, it is clear that plaintiffs could institute another action in which they could properly allege that claim and in such action the Court would not be precluded by any ruling in this cause from giving full consideration to such right.

City of Los Angeles v. Mellus, 59 Cal. 444;
2 *Freeman on Judgments* (5th Edition, Sections 745, 747).

C. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION.

1. The questions propounded by plaintiffs have been foreclosed by previous decisions of this Court.

The identical claims now urged by plaintiffs as to federal rights based upon the Norris-LaGuardia Act and the National Labor Relations Act have been heretofore rejected by this Court.

In *Fur Workers Union No. 21238 v. Fur Workers Union No. 72,* 105 F. (2d) 1, the Court of Appeals for the District of Columbia rejected the claim. This Court affirmed in a *per curiam* decision (308 U. S. 522, 60 S. Ct. 292, 84 L. Ed. 443), citing *Lauf v. Shinner & Co.,* 303 U. S. 323, 58 S. Ct. 578, 82 L. Ed. 872; *New Negro Alliance v. Sanitary Grocery Co.,* 303 U. S. 552, 58 S. Ct. 703, 82 L. Ed. 1012 and calling attention to *Senn v. Tile Layers Protective Union,* 301 U. S. 468, 57 S. Ct. 857, 81 L. Ed. 1229.

Likewise, in *Lauf v. Shinner,* 303 U. S. 323, 58 S. Ct. 578, 82 L. Ed. 872, this Court rejected the contention.

2. A contrary decision of the California Supreme Court would have denied to defendants their constitutional right of freedom of speech.

American Federation of Labor v. Swing, 61 S. Ct. 568;

Thornhill v. Alabama, 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093;

Carlson v. California, 310 U. S. 106, 60 S. Ct. 736, 84 L. Ed. 1104.

3. The California Courts' application of the term "labor dispute" to any controversy which is reasonably related to employment and to the purposes of collective bargaining is reasonable and hence does not compose a federal question.

Lauf v. Shinner, supra;

Senn v. Tile Layers Protective Union, supra.

D. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE JUDGMENT OF THE STATE COURT IS BASED UPON NON-FEDERAL GROUNDS ADEQUATE TO SUPPORT IT.

The judgment of the California Supreme Court rests upon the following non-federal grounds which are adequate to support it: (1) the procedural ground, to-wit, the construction of plaintiffs' complaint according to state rules of pleading; (2) the substantive ground, to-wit, the ruling that under the California Labor Code affiliated labor unions may engage in a strike and picket a partially unionized employer for the purpose of securing a closed union shop. (R. 92.)

E. AN ANALYSIS OF PLAINTIFFS' "QUESTIONS PRESENTED" (Petition, p. 9) CONCLUSIVELY DEMONSTRATES THAT THE WRIT OF CERTIORARI SHOULD BE DENIED.

In answer to the diffuse petition and brief of petitioners we briefly dispose of the basic "Questions Presented", which plaintiffs frame as their specification of errors and reasons for granting the writ. We will quote and consider each such question seriatim.

Question 1(a). Does not the decision of the California Supreme Court deny to petitioners the fundamental right to self-organize free from employer interference, guaranteed by Sections 7 and 8 of the Wagner Act?

Answer 1. The California Supreme Court has not denied to plaintiffs any right under the National Labor Relations Act. The Court ruled only that it would not consider the asserted right because plaintiffs failed to plead it adequately.

2. Even had the Court considered the asserted right of plaintiffs under the National Labor Relations Act and nevertheless rendered the present decision, it would have denied plaintiffs no constitutional rights and would have been supported by previous adjudications of this Court.

Question 1(b). Is not this right guaranteed by Section 2 of the Norris-LaGuardia Law (47 Stat. 70) by necessary implication?

Answer. No citation of authority is required to support the proposition that the Norris-LaGuardia Act is concerned solely with the jurisdiction of the federal Courts.

Question 1(c). Is not this right part of the liberty and property of which the state cannot deprive a person without due process of law under the XIV Amendment?

Answer 1. This proposition has heretofore been adjudicated by this Court contrary to the asserted right of plaintiffs. (*Lauf v. Shinner,* supra; *Fur Workers Union v. Fur Workers Union,* supra.)

2. A contrary decision of the state Court would have infringed the respondents' constitutional guarantee of freedom of speech. (*American Federation of Labor v. Swing,* supra.)

3. The XIV Amendment is inapplicable because the instant case concerns the conduct of one individual toward another, and the only state action involved is the Court's declaration that such individual conduct does not violate its laws. The mere non-interference of the state in a controversy between its citizens is not such state action as is contemplated by the XIV Amendment.

Question 2. Is the allegation that petitioners "united and organized in accordance with the Wagner Labor Relations Act" a mere legal conclusion?

Answer 1. This question involves the application of state rules of pleading, and the decision of the state Court upon it will not be upset in the absence of a showing that such decision was rendered in a spirit of evasion to defeat the claim of federal right.

2. The asserted rights of plaintiffs under the National Labor Relations Act have been considered in the answer to Question 1(a).

Question 3. Must the employer be shown to be engaged in interstate commerce before the employee can assert or exercise the right to self-organize without employer interference?

Answer. The only relevancy of the question pertains to plaintiffs' asserted right under the National Labor Relations Act, which we have previously considered in the answer to Question 1(a).

Question 4. Does the right of petitioners to self-organize depend on the Labor Board's certification of petitioners' organization as the proper bargaining unit?

Answer. This question has been answered under the previous heading.

Question 5. Must the self-organizing employees embrace all the workers in a plant before they can assert the right to self-organize?

Answer 1. The California Court rendered no such decision as is implied by this question.

2. The part of the decision of the California Supreme Court which dealt with this subject did not concern the asserted federal right of plaintiffs but rather the necessity of specific allegations in a complaint seeking a temporary injunction in a labor dispute where it is contended that the plaintiffs organized a bona fide independent labor union.

Question 6. Must the petitioner have affiliation with an outside labor organization before they can assert the right?

Answer. The answer to this question is the same as the answer to Question 5.

Question 7. Must the petitioners show they have a constitution, by-laws, pledges or rules before they can assert the right?

Answer. The answer to this question is the same as the answer to Question 5.

Question 8. Must petitioners "negative" all "unity of interest" between themselves and their employers to assert the right?

Answer. The answer to this question is the same as the answer to Question 5.

Question 9. Does not the act of the Supreme Court of California in purporting to find and recite, on no evidence at all, that petitioners have no constitution, by-laws, pledges or rules, and that there is an apparent unity of interest between petitioners and their employers, deprive petitioners of liberty and property without due process of law?

Answer. Plaintiffs fail to recognize that the only matter before the California Supreme Court was the interpretation of plaintiffs' complaint, which, the Court held insufficient to sustain injunctive relief on behalf of plaintiffs' "organization" in the absence of specific allegations as to the nature of such organization.

Question 10. Does not the decision of the Supreme Court of California by construction of the unambiguous Section 921 of the California Labor Code to authorize a labor organization with outside affiliations to coerce petitioners' employer into coercing petitioners to join defendants' organization while denying to petitioners' organization the same right, deny to petitioners the equal protection of the law under the XIV Amendment?

Answer 1. The judgment of the California Supreme Court on the construction of a California statute is conclusive. (*Senn v. Tile Layers Protective Union,* supra.)

2. The California Court's construction of the California Labor Code is the same as the Wisconsin

Court's reading of the Wisconsin Labor Code. Such a construction has been held not to violate the XIV Amendment. (*Senn v. Tile Layers Protective Union,* supra.)

3. As stated by this Court in the *Senn* case the issue of equal protection of the law does not arise for the reason that one has no constitutional right to a remedy against lawful conduct of another.

4. Finally, the decision of the California Supreme Court does not deny to petitioners' organization any rights which it grants to respondents' organization. There is not one syllable in the decision which sets up under the California Labor Code different rights for a bona fide company union than for a bona fide non-company union. Both unions under the decision would be equally saved from the interference of a Court of equity by injunctive process.

We therefore respectfully urge that the petition for certiorari is entirely without merit and should be denied.

Dated, San Francisco, California,
April 4, 1941.

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